SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 640

DR. TOM H. ROBERTSON, M. D.,
Petitioner,

vs.

NEW YORK LIFE INSURANCE COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN AND BRIEF IN SUPPORT THEREOF.

DR. TOM H. ROBERTSON, M. D.,
Petitioner, pro se.

INDEX

Subject Index

	Page
Petition for a writ of certiorari	1
Statement of the matter involved	1
Petitioner has been deprived of his right to a jury trial	16
Petitioner has been deprived of his right to a full and complete hearing on all issues	17
Petitioner has been deprived of his rights and property without due process of law	18
Petitioner has been deprived of his right to equal application and protection of law	20
Brief in support of petition	23
Statement regarding jurisdiction	23
Statutory provision believed to sustain the jurisdiction	23
Michigan statutes and court rules validity of which is involved	24
Date of judgment sought to be reviewed	26
Date upon which application for appeal is presented	26
Nature of case	26
Petitioner has been deprived of his right to a jury trial	27
Petitioner has been denied his right to a full and complete hearing on all the issues	28
Petitioner has been denied his right to "due process of law"	29
Petitioner has been denied his right to "equal application and protection of law"	30

Table of Cases Cited

American Ins. Co. v. *Gentile Bros. Co.*, 109 F. (2d) 732, 310 U. S. 633, 60 S. Ct. 1075, 84 L. Ed. 1403	17
American Surety Co. v. *Baldwin*, 287 U. S. 156, 53 S. Ct. 98, 77 L. Ed. 231, 86 A. L. R. 298	20

Page

Angle v. *Chicago, St. P. M. & O. R. Co.*, 151 U. S. 1, 14 S. Ct. 240, 38 L. Ed. 55 18
Bacon v. *Mich. Central R. R. Co.*, 55 Mich. 224, 66 Mich. 166 14
Bartenbach v. *Smith*, 268 Mich. 753, 95 A. L. R. 238 15
Baylis v. *Travelers' Insurance Co.*, 113 U. S. 316, 5 S. Ct. 494, 28 L. Ed. 989 16
City of Grand Rapids v. *Powers*, 89 Mich. 94 17
Cohen v. *Peerless Soda Fountain Service Co.*, 257 Mich. 679 12
Davidow v. *Wadsworth Mfg. Co.*, 211 Mich. 90 20
Dempsey v. *Langton*, 266 Mich. 47 12
Diversey Liquidating Corp. v. *Neunkirchen*, 370 Ill. 523, 19 N. E. (2d) 363, 120 A. L. R. 1395 ..... 27, 28
Ehlers v. *Stoeckle*, 37 Mich. 261 18
Fidelity and Deposit Co. v. *U. S.*, 187 U. S. 315 15
Gustin v. *Alpena Circuit Judge*, 285 Mich. 192 18
Hallett v. *Consolidated Gas Co.*, 298 Mich 582 15
Hecker Products Corp. v. *Trans American Freight Lines, Inc.*, 296 Mich. 381 13
Holden v. *Harvey*, 169 U. S. 366, 18 S. Ct. 383, 42 L. Ed. 780 19
Hovey v. *Elliott*, 167 U. S. 409, 17 S. Ct. 841, 42 L. Ed. 215 20
Jones v. *Eastern Mich. Motorbuses*, 287 Mich. 619 17
Kilbourn v. *Thompson*, 103 U. S. 168, 26 L. Ed. 377 19
Louisville & Nashville, R. R. Co. v. *Bosworth*, 230 Fed. 191 21
Lyon v. *Smith*, 66 Mich. 678 13
Myles Salt Co. v. *Iberia, etc., Drainage District*, 239 U. S. 478 ..... 21, 29
Nestle v. *Fleming*, 262 Mich. 417 15
Noyes v. *Hillier*, 65 Mich. 636 17
Pennoyer v. *Neff*, 95 U. S. 679, 24 L. Ed. 565 ..... 20, 29
Peoples Wayne County Bank v. *Wolverine Box Co.*, 250 Mich. 273 ..... 12, 15
Prince v. *Clark*, 81 Mich. 167 17
Rees v. *Watertown*, 19 Wall. 107, 22 L. Ed. 72 19
Scarney v. *Clark*, 276 Mich. 295 15
Slaughter House Cases, 16 Wall. 36, 21 L. Ed. 394 ..... 19, 29

Page

Stephenson v. *Golden*, 279 Mich. 439 18
Terre Haute Brewing Co. v. *Goldberg*, 291 Mich. 401 13
Township of Caledonia v. *Rose*, 94 Mich. 216 17
Turpin v. *Lemon*, 187 U. S. 51, 23 S. Ct. 20, 47 L. Ed. 70 19
Vincent v. *Van Blooys*, 263 Mich. 312 15
Whitaker v. *Coleman*, 115 F. (2d) 305 13
Windsor v. *McVeigh*, 93 U. S. 274, 23 L. Ed. 914 ..... 17, 29

STATUTES CITED

American Jurisprudence, Title "Courts", Sec. 152 .. 28
Constitution of the United States:
Article I, Section 10 4
Article V 4
Article VI 4
Article XIV 4

Corpus Juris, Vol. 14a, p. 765 14
Judicial Code, Section 237, 28 U. S. C. A. 344 (R. S. 690, 709; Mar. 3, 1911, c. 231, Sections 236, 237, 36 Stat. 1156; Dec. 23, 1914, c. 2, 38 Stat. 790; Sept. 6, 1916, c. 448, Sec. 2, 39 Stat. 726; Feb. 17, 1922, c. 54, 42 Stat. 366; Feb. 13, 1925, c. 229, Section 1, 43 Stat. 937) 1, 2, 11, 23

Michigan Compiled Statutes of 1929:
Section 14260 ..... 2, 24, 30
Section 14263 ..... 3, 24
Section 14471 ..... 11, 13, 25
Section 14472 ..... 11, 13, 25

Rules of the Supreme Court of Michigan:
Rule 30, Sec. 7 ..... 21, 25
Rule 40 26
Rule 41 26

Ruling Case Law, Title "Courts", Sec. 51 28

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 640

DR. TOM H. ROBERTSON, M. D.,

Petitioner,

vs.

NEW YORK LIFE INSURANCE COMPANY, A NEW YORK STATE CORPORATION,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MICHIGAN

The petition for review on writ of certiorari of the decision of the Supreme Court of the State of Michigan as contained in the certified transcript of the record in the case, including the proceedings in said Supreme Court of the State of Michigan, which accompanies this petition, and which is identified further as calendar number 42951 of said Supreme Court of the State of Michigan, respectfully shows unto this Honorable Court as follows:

Statement of the Matter Involved

The Federal statute which gives this Court jurisdiction is section 237 of the Judicial Code, Title 28 U. S. C. A. 344 (R. S. §§ 690, 709; Mar. 3, 1911, c. 231, §§ 236, 237, 36 Stat. 1156; Dec. 23, 1914, c. 2, 38 Stat. 790; Sept. 6, 1916, c. 448, § 2,

39 Stat. 726; Feb. 17, 1922, c. 54, 42 Stat. 366; Feb. 13, 1925, c. 229, § 1, 43 Stat. 937) which provides in part that "(b) It shall be competent for the Supreme Court, by certiorari, to require that there be certified to it for review and determination, with the same power and authority and with like effect as if brought up by writ of error, any cause wherein a final judgment or decree has been rendered or passed by the highest court of a State in which a decision could be had where is drawn in question * * * the validity of a statute of any State on the ground of its being repugnant to the Constitution, treaties, or laws of the United States; or where any title, right, privilege, or immunity is specially set up or claimed by either party under the Constitution * * * of * * * the United States * * *."

2. The Michigan statute is the summary judgment statute, section 14260 of Michigan Compiled Laws of 1929, which provides:

> "At any time after any cause arising upon contract or judgment, or statute shall be at issue, upon motion of the plaintiff, after the usual notice to the defendant, supported by the affidavit of the plaintiff, or any one in his behalf having knowledge of the facts verifying the plaintiff's cause of action, and stating the amount claimed, and his belief that there is no defense to the action, the court shall enter a judgment in favor of the plaintiff, unless the defendant shall prior to, or at the time of hearing said motion, make and file an affidavit of merits. Said affidavit of merits shall state whether or not the defense claimed therein applies to the whole of the plaintiff's claim and if not, it shall state definitely what item or items of the plaintiff's claim and the amount thereof is admitted."

(Figures in parentheses refer to pages of printed record, italics and capitals used in quoted matters are ours, unless the context clearly indicates otherwise.)

3. Another Michigan Statute which is also involved is section 14263 of Michigan Compiled Laws of 1929, which provides:

> "All issues of law shall be tried by the court, and all the issues and questions of fact, shall be tried by the court, unless a jury be demanded by one of the parties, in a manner prescribed by the rules of the court: Provided, that in all actions of tort, and in all other actions the subject matters whereof are, in the opinion of the court, peculiarly proper for the consideration of a jury, it shall be competent for the court to order the cause to be tried by a jury."

4. Based upon the above statutes, the Michigan Supreme Court made a rule, known as Michigan Court Rule 30, pertaining to summary judgments, and section 7 of said Rule 30 provides:

> "In any action at law the DEFENDANT may, after issue is joined, move the court for entry of judgment in his favor upon a showing by affidavits or depositions filed in the cause that there is NO QUESTION OF FACT to be determined by the court or jury and that he is entitled to a judgment in his favor. Before judgment is entered the plaintiff shall be given a reasonable opportunity to obtain and file affidavits and depositions controverting the facts set forth in the affidavits or depositions filed by the defendant. EITHER PARTY SHALL BE GIVEN THE FURTHER OPPORTUNITY TO CROSS-EXAMINE WITNESSES WHOSE AFFIDAVITS HAVE BEEN FILED OR WHOSE DEPOSITIONS HAVE BEEN TAKEN WITHOUT AFFORDING SUCH OPPORTUNITY OF CROSS EXAMINATION. FACTS SET FORTH IN SUCH AFFIDAVITS OR DEPOSITIONS, WHICH IT APPEARS THE WITNESSES COULD NOT TESTIFY TO UNDER THE RULES OF EVIDENCE PRESCRIBED BY LAW SHALL NOT BE CONSIDERED. If it appears to the court from such affidavits and depositions that the defendant is entitled to a judgment AS A MATTER OF LAW, WITHOUT DECIDING ANY CONTROVERTED ISSUE OF FACT the court shall enter such judgment, and

the plaintiff may appeal therefrom. BOTH PLAINTIFF AND DEFENDANT ARE TO HAVE AN EQUAL RIGHT TO A SUMMARY JUDGMENT, UPON PROPER PROOFS."

5. Petitioner contends that both the Michigan Circuit Court for the County of Wayne and the Supreme Court violated the provisions of the U. S. Constitution by rendering a summary judgment for the Respondent and that the constitutional limitations are:

> Article I, Section 10 and Article VI (2) and
> Articles V and XIV, Section 1 of Amendments to said U. S. Constitution.

6. Petitioner raised the constitutional issues first in the trial court by his "Answer and Objections to Motion of Defendant New York Life Insurance Co. for Summary Judgment" (63-64) and by his "Motion to Vacate Summary Judgment" (66-72, at 67). Petitioner also sought leave of the trial court to take depositions by his "Motion for Order to Take Depositions of all of the Defendants" (35-37) filed Aug. 3, 1943, before Respondent's motion for summary judgment was filed on Nov. 26, 1943, and renewed said motion to take depositions by a motion filed Feb. 1, 1944 (70-72) in conjunction with his "Motion to Vacate Summary Judgment" (66-72).

7. Petitioner raised the constitutional issues first in the Michigan Supreme Court by his "Statement of Reasons and Grounds of Appeal and Assignments of Error" (75-77, at 76), and Petitioner briefed and argued said issues and questions before the Michigan Supreme Court, which mentioned some of them in its "Opinion" (282). Petitioner also raised said issues and questions in his "Petition for Rehearing" (294 at —) with supporting brief, which rehearing was denied by the Michigan Supreme Court on September 5, 1945, by its "Order" (296).

8. The Michigan Supreme Court in its "Opinion" (282-291) held regarding said constitutional issues and questions as follows:

> "Under the facts and circumstances shown by the record, the granting of the summary judgment did not deprive plaintiff of due process of law or of other constitutional rights" (282 at 291).

9. The date of the judgment rendered by the Circuit Court for the County of Wayne in favor of the Respondent is Dec. 23, 1943 (65); the date of the "Order Denying Motion to Vacate Judgment" by said Circuit Court is Mar. 3, 1944; the date of filing of the Michigan Supreme Court's "Opinion" is June 29, 1945; and the date of filing of the Michigan Supreme Court's "Order Denying Rehearing" is Sept. 5, 1945.

10. Petitioner's third amended declaration (8-18) charges that the several defendants named did jointly and severally and with malice aforethought conspire to slander and did slander Petitioner concerning his profession and business of physician, surgeon and medical examiner of Respondent life insurance company by the publication of false and slanderous statements concerning his treatment of certain women applicants for life insurance who were physically examined by plaintiff as such examiner. The declaration charges that the defendants concocted the slanderous statements concerning plaintiff (Petitioner) as a medical examiner and his treatment of women applicants and his anti-semitic attitude in order to furnish a plausible excuse for dropping him as medical examiner. Claiming that it was necessary to take Petitioner's deposition in order to enable it to plead to the declaration, Respondent corporation sought and obtained an order (19-20) to take Petitioner's deposition (117-166) under Michigan Court Rule 41.

Likewise it obtained a second order (38) to take plaintiff's supplemental deposition (167-175).

11. On March 2, 1943, when Petitioner sought an order to take the depositions of all of the defendants (2) the lower court granted the motion as to the defendant Harry Hicks only (21-2) and his deposition was taken (177-225). Petitioner brought a second motion (35-37) for an order to take the depositions of all of the defendants on August 3, 1943, but permission was not granted.

12. Petitioner is a licensed doctor of medicine and surgery, a graduate of the University of Michigan Medical College (8, 119, 229) and, together with his brother, Dr. Stanley B. Robertson, has lived and practiced his profession in the City of Detroit and environs, with offices in the Maccabees Building, since August 19, 1919. Under date of July 26, 1936, plaintiff wrote to defendant insurance corporation at its New York office requesting appointment of himself and his brother as medical examiners (227). Under date of March 22, 1937, he and his brother made written applications for the positions (229, 231). They received a letter dated Mar. 26, 1937 notifying them of their appointment and instructing them to see the Supervisor or Inspector of Agencies, Mr. Baldwin, for further instructions (120, 234). Shortly thereafter, they replied by letter, accepting the appointments, and began work as medical examiners about Easter, 1937 (122-235). Their work as such required them to handle the territory on both sides of Woodward Avenue, from the river north, as pointed out to them by Mr. Baldwin (123). The Respondent corporation paid them a fee of three dollars (131) for each examination made (123) and the appointment was to be for as long as they lived in the district and did satisfactory work as examiners (124, 125). Mr. Baldwin was seriously injured in an automobile acci-

dent about six months later, and that is where plaintiff-petitioner's hard luck began (125).

13. On April 27, 1938, Petitioner wrote a confidential letter to Respondent corporation's Chief Medical Director, R. A. Fraser, M. D., complaining about the scarcity of medical examinations and requesting more work (242-243) and received a negative reply from Dr. E. J. Campbell, Medical Director (243-244). In the summer of 1939, Dr. Campbell was in Detroit and plaintiff talked with him, and he said he would call the attention of defendant Hicks to the fact that more business should be furnished to plaintiff and his brother (128). In April, 1940, plaintiff talked to defendant Hicks at his residence about the matter and about the boycott against himself and his brother (131).

14. On November 30, 1940, Petitioner again wrote defendant Dr. Fraser, complaining about the boycott and scarcity of work due to accusations that they were "anti-Jewish" and that they had refused to pass crooked business (131) and to falsify reports of their medical findings, change examination dates, etc. (236-239). On Dec. 6, 1940, defendant, Dr. Campbell, replied for defendant, Dr. Fraser, stating that no changes would be made and that if they were not satisfied, they could resign (239-241). Plaintiff and his brother did not resign. However, about Nov. 1, 1941, Petitioner was requested by Mr. William Essery, a member of defendant corporation's Detroit law firm, to sign an affidavit about an applicant who had died, and plaintiff was told that the affidavit was required because "he didn't know how long I would be with the company" (129). It was then that Petitioner first became suspicious that he and his brother had been dropped from the list of approved medical examiners (129). In September, 1941, Petitioner had been "warned about being framed" by one of the agents of the company who had overheard the plot (130).

15. On November 10, 1941, Petitioner was informed by several of the Respondent corporation's agents that his name was not on the list, and he and his brother went to see Mr. Hicks to find out why he had taken their names off (132). At first, Mr. Hicks told them it was because he had too many examiners, but after they kept "quizzing him" he said he had been to New York at a company banquet in August (132) and that, as he went through the banquet hall, defendant, Dr. Roscoe Pratt, at one of the tables, grabbed hold of his coat sleeve and "dragged him down on the arm of the chair and poured out all kinds of accusations against us, about how we manhandled the women and practically everything except attacked them, I guess; that we handled their breasts and private parts and exposed them, and had them—well, had them go through everything that was embarrassing to them. He said he had been knocked out with such accusations; that he was so dazed that Dr. Pratt should utter all these at the banquet and had such a crowd around, that he was just dazed with it, and said he was knocked out—he was speechless. He told us this on November 12th, at his office in the First National Bank Building (133). * * * He said they had numerous complaints in the New York office, and numerous letters had been written by the applicants. * * * Dr. Pratt * * * is the Associate Medical Director of the Company. * * * He said he would write Dr. Pratt and get us the details and the information, but he never did" (133-134).

16. Petitioner immediately wired Dr. Pratt for details, and wired Dr. Fraser the next day (134, 244-246). He received a letter (246-247) from Dr. E. J. Campbell, and again wired Dr. Fraser on November 16, 1941 (247-248). On November 18, 1941, Petitioner and his brother wrote Respondent corporation at its New York office (249-266) and enclosed a copy of their letter sent to it at its Detroit

office (250-252). Receiving no reply, they again wrote on December 7, 1941 (252-253, 267-268). They also wrote to Mr. Geo. B. Cortelyou, company director, enclosing copies on Dec. 8, 1941 (253-254). Each of the other directors rereceived similar letters (136). Receiving no reply, they wrote to Geo. L. Harrison, company president on Feb. 2, 1942 (159, 254-256), and they wrote again on Feb. 12, 1942 (159, 256-258). Again, they wrote on Mar. 10, 1942 (160, 259-260) and on Apr. 16, 1942 (160, 260-261), but all to no avail.

17. Petitioner started suit by summons on Sept. 29, 1942, and filed his declaration on Nov. 18, 1942, which declaration was later thrice amended, after several motions by some of the defendants to make the declaration more definite and certain, and the third amended declaration was filed on July 9, 1943 (3, 8-18).

18. Petitioner declared his suit in an action of trespass on the case for slander and conspiracy to slander committed jointly and severally by the defendants, including respondent corporation (8-18). August 3, 1943, Petitioner made a motion in the court of first instance (35-37) for an order to take the depositions of all of the defendants, which the lower court heard but failed to act upon favorably to Petitioner.

19. After bringing several unsuccessful motions to dismiss, and, after filing its answer on Sept. 1, 1943 (42-45), Respondent corporation made a motion for a summary judgment on Nov. 26, 1943 (57-62). Petitioner filed his answer and objections to the motion for summary judgment on Dec. 20, 1943 (63-64) and the motion was heard for the first time by the trial court on Dec. 20th and again on Dec. 22, 1943 (78-116), and, on Dec. 23, 1943, the trial court

made an order granting the motion of Respondent company and entered a judgment of "not guilty" (65).

20. Petitioner filed his first claim of appeal to the Michigan Supreme Court from the summary judgment for defendant company on Jan. 11, 1944, and, on Feb. 1, 1944, filed a motion to vacate the judgment (66-70) and a second and new motion to take the depositions of certain of the defendants as named (70-72).

21. On Mar. 10, 1944, the trial court made its final order (73), dated Mar. 3, 1944, denying plaintiff-petitioner's motion (66-72) to vacate the summary judgment, and, on Mar. 16, 1944, Petitioner filed his second claim of appeal from such holding (73-74).

22. Petitioner alleged twelve reasons and grounds of appeal and assignments of error, including the constitutional grounds (75-77, at 76).

23. As the basis for its motion for a summary judgment (57-62), the Respondent insurance corporation claims that it did not authorize or ratify the alleged slanderous statements and conspiracy to calumniate and slander Petitioner doctor and medical examiner for the alleged purpose of terminating or furnishing an excuse to terminate, his employment with the company. Petitioner claims that he can prove the allegations to the satisfaction of a court and jury and particularly with reference to the disputed authorization and ratification of the conspiracy and slander by Respondent insurance corporation used by it as an excuse to terminate Petitioner's employment as such medical examiner (63, 64, 66-69, 84-87, 98-116).

24. Petitioner's "Claim of Appeal" (First) was filed Jan. 11, 1944 (66). Petitioner's "Claim of Appeal" (Second) was filed March 16, 1944 (73-74). The appeal was heard

by the Michigan Supreme Court at the June Term, 1945, and its "Opinion" was filed on June 29, 1945 (282-291). Petitioner's "Petition for Rehearing" was filed in the Michigan Supreme Court on or about July 14th, 1945 (294), which was within the time prescribed for such filing by the Michigan Court Rules and statutes, which is twenty days from the date the "Opinion" is filed. On Sept. 5, 1945, the Michigan Supreme Court, which is the court of last resort in Michigan, denied Petitioner's "Petition for Rehearing" by its "Order" of denial thereof (296). Petitioner therefore presents this his Petition to this Honorable Court within three months thereafter and not later than Dec. 5, 1945, as provided by section 237 of the Judicial Code, Title 28, U. S. C. A. 344 (R. S. § 1008; Mar. 3, 1891, c. 517, § 6, 26 Stat. 828; Sept. 6, 1916, c. 448, § 6, 39 Stat. 727; Feb. 13, 1925, c. 229, § 8 (a, b, d), 43 Stat. 940.)

25. Petitioner contends that he is entitled to a jury trial of the issues involved, under the provisions of sections 14471 and 14472 of Michigan Compiled Laws of 1929. Section 14471 provides:

> "In suits brought for the recovery of damages for libel or slander in this state, the plaintiff shall be entitled to recover only such actual damages as he may have suffered in respect to his property, business, trade, PROFESSION, occupation or feelings."

Section 14472 provides that the:

> "Jury shall in all cases specify the amount awarded for damages to feelings separately from the amount awarded for other damages mentioned in the foregoing section."

26. Petitioner contends that Michigan Court Rule 30, section 7, which is the only provision of Michigan law or Court Rule authorizing the Court to entertain a motion for

a summary judgment by Respondent, defendant in the suit in Michigan, is confined to cases where there are NO CONTROVERTED ISSUES OF FACT AND IN WHICH BOTH THE PLAINTIFF AND DEFENDANT ARE TO HAVE AN EQUAL RIGHT TO A SUMMARY JUDGMENT. That there are disputed issues of fact in the case at bar concerning the authorization and ratification of the slander and conspiracy by Respondent corporation is established by the depositions of the Petitioner, the defendant Supervisor of Agencies, Harry H. Hicks, and the pleadings filed by the respective parties. That Petitioner does not have an EQUAL RIGHT TO A SUMMARY JUDGMENT must be conceded because his claim is not yet liquidated in amount, and for which he claims a million dollars damages, as shown by his declaration. The Michigan Supreme Court has held that a summary judgment may not be sought where the moving party has an unliquidated claim, as in the case at bar, viz:

> "In action for professional services for amount not determined by contract, express or implied, or NOT LIQUIDATED in some manner, MOTION FOR SUMMARY JUDGMENT SHOULD NOT BE GRANTED."
>
> *Cohen* v. *Peerless Soda Fountain Service Co.*, 257 Mich. 679 (Syllabus 2).

The Michigan Supreme Court has also held:

> "The summary judgment law provides a speedy method of determining whether there are any ISSUES OF FACT in causes arising upon contract, judgment or statute. If there are such issues of fact, the motion for a summary judgment is denied, and the issues are left for a JURY TO DETERMINE."
>
> *Peoples Wayne County Bank* v. *Wolverine Box Co.*, 250 Mich. 273.

> "This court has REPEATEDLY HELD that IT IS IMPROPER TO GRANT A SUMMARY JUDGMENT WHERE THERE IS A DISPUTE AS TO THE FACTS * * *."
>
> *Dempsey* v. *Langton*, 266 Mich. 47, at 50.

"It is contrary to all right to finally determine legal claims on motion and affidavit."

Lyon v. *Smith,* 66 Mich. 678.

"An examination of the supporting affidavits included in plaintiff's motion for summary judgment discloses that the claim was for UNLIQUIDATED damages. Until they were ascertained in a legal manner, there could be no final judgment. Cohen v. Peerless Soda Fountain Service Co., 257 Mich. 679."

Hecker Products Corp. v. *Trans American Freight Lines, Inc.,* 296 Mich. 381, at 386.

The provisions of section 7 of Michigan Court Rule 30 bar Petitioner from seeking a summary judgment, because of controverted issues of fact, both in the pleadings and depositions. In the case of *Terre Haute Brewing Co. Inc.* v. *Goldberg,* 291 Mich. 401, it was held that in an action of assumpsit based on the common counts, if there was an issue of fact as to whether or not the defendant was indebted to the plaintiff in a certain amount, the plaintiff could not recover on a motion for a summary judgment (citing Michigan Court Rule 30 of 1933 and section 14260 Michigan Compiled Laws of 1929, Mich. Statutes Ann. § 27.989). It was the intent of the Michigan legislature that slander suits should be tried by juries, as shown by sections 14471 and 14472 Michigan Compiled Laws of 1929.

A Federal Court has stated:

"The summary judgment procedure is valuable for striking through sham claims and defenses which stand in the way of a direct approach to the truth, but was not intended to and CANNOT DEPRIVE A LITIGANT OF A RIGHT TO A JURY TRIAL."

Witaker v. *Coleman,* C. C. A. 1940, 115 F. 2d, 305.

The civil liability of a principal for the slanders of his agents is stated in 2 Corpus Juris at page 847 as follows:

> "534. In accordance with the above rule a principal may be held civilly liable to a third person where his agent, while acting within the course or scope of his REAL OR APPARENT AUTHORITY, IS GUILTY OF * * * libel and SLANDER."

In 14a Corpus Juris, at page 765 it is stated:

> "Sec. 2829. In the same manner as natural person is liable for acts of his agent or servant, a corporation is liable civilly for all torts committed by its servants or agents under its express or implied authority. The act of the servant or agent in order to impose liability on the corporation must have been within the scope of his authority or course of employment, but subject to this limitation, it may have been without orders or even in disobedience or excess of instructions or even malicious or wilful. NOR NEED THE CORPORATION HAVE AUTHORIZED THE DOING OF THE PARTICULAR ACT OR RATIFIED IT AFTER IT WAS DONE * * *."

In an early leading case in Michigan, the Michigan Supreme Court stated:

> "Since however, corporations have taken such common and important parts in the business of the country, and have been created for almost every conceivable purpose where an aggregation of capital can be employed to advantage, it has been considered to be more consonant with the principles of justice to hold them to a large measure of the accountability which attaches to individuals. IT IS WELL SETTLED IN THIS STATE THAT AN ACTION CAN BE MAINTAINED AGAINST A CORPORATION FOR LIBEL * * *."
>
> *Bacon* v. *Mich. Central R. R. Co.*, 55 Mich. 224, at 228 and 229.

The Michigan Supreme Court reaffirmed its position in the above case on a second appeal:

Bacon v. *Mich. Central R. R. Co.*, 66 Mich. 166, at 172, 173 and 175.

It is a violation of the "due process" clause of the Federal Constitution to compel Petitioner to try his case piecemeal:

"* * * The requirement that an issue of fact in the actions enumerated in section 425, must be tried by a jury does not deprive the court of the power to ascertain whether there is in truth an issue of fact to be tried * * *. It prescribes the means of making an issue. The issue made as prescribed, THE RIGHT OF TRIAL BY JURY ACCRUES * * *.

" 'In Fidelity and Deposit Co. v. U. S., 187 U. S., 315, Mr. Justice McKenna * * * said:

"Now what does the rule mean * * *? It says the DEFENDANT shall set out his grounds of defense and swear to them. It does not mean a defense in all its details of incident and fact, but the foundation of defense. That is all * * *. It was never contemplated that this rule required a party to follow his case through all the lights and shadows of the evidence in it. That would be to hold it essential that he should try his case in his plea.' "

Peoples Wayne Co. Bank v. *Wolverine Box Co.*, 250 Mich. 273, at 279 and 280.

The denial of Petitioner's motions to take depositions is a violation of the "due process" clause of the Federal Constitution as shown by the holdings of the following cases:

Nestle v. *Fleming*, 262 Mich. 417;
Vincent v. *Van Blooys*, 263 Mich. 312;
Bartenbach v. *Smith*, 268 Mich. 653, 95 A. L. R. 238;
Scarney v. *Clark*, 276 Mich. 295;
Hallett v. *Consolidated Gas Co.*, 298 Mich. 582.

27. Petitioner contends that the summary judgment in favor of Respondent corporation violates the Federal Constitution by (a) depriving Petitioner of his right to a jury trial, (b) depriving Petitioner of his right to a full and complete hearing on all issues, (c) depriving Petitioner of his right to "due process of law" and (d) depriving Petitioner of his right to equal application and protection of law.

(A) Petitioner Has Been Deprived of His Right to a Jury Trial

By the summary judgment procedure in the case at bar, Petitioner has been deprived of the right to have a jury pass upon all disputed issues of fact. The dispute over whether or not Respondent authorized and ratified the slander can only be legally determined in accordance with the Constitutional guaranty by a jury trial on the merits and cannot be determined by the piecemeal method here employed.

It has been held that the trial of issues of fact in civil cases by the courts of the United States, without the intervention of a jury, can be had only when the parties waive their right to a jury by a stipulation in writing:

> *Baylis* v. *Travelers' Insurance Co.*, 113 U. S. 316, 5 Sup. Ct. Rep. 494, 28 L. Ed. 989.

In the same *Baylis* case, *supra,* the court held that it was error for the trial court to substitute itself for the jury and pass upon the effect of the evidence.

The Michigan Supreme Court stated:

> "Nor should we erroneously assume that the provisions of Court Rule No. 64 (1933) may be extended to the review of cases tried by juries, and thereby a liti-

gant be deprived of his CONSTITUTIONAL RIGHT TO A TRIAL BY JURY."

Jones v. *Eastern Mich. Motorbuses,* 287 Mich. 619, at 652.

(B) Petitioner Has Been Deprived of His Right to a Full and Complete Hearing on All Issues

By granting and affirming the summary judgment for Respondent, the Michigan Courts have deprived Petitioner of his right to a full and complete hearing on all of the issues in dispute, contrary to the U. S. Constitution in such regard. Every person is entitled to his day in court whenever his interests are involved, and to due notice of the proceedings, and TO REASONABLE OPPORTUNITY TO APPEAR AND BE HEARD. The Michigan Supreme Court has so held in:

Noyes v. *Hillier,* 65 Mich. 636;
Prince v. *Clark,* 81 Mich. 167;
City of Grand Rapids v. *Powers,* 89 Mich. 94;
Township of Caledonia v. *Rose,* 94 Mich. 216.

Under Rule 56 of the Federal Rules of Civil Procedure, it was held that a summary judgment should be awarded ONLY WHEN THE TRUTH IS QUITE CLEAR, in:

American Ins. Co. v. *Gentile Bros. Co.,* C. C. A. Fla. 1940, 109 F. 2d 732, certiorari denied, 1940, 60 S. Ct. 1075, 310 U. S. 633, 84 L. Ed. 1403.

This Court held:

"A sentence of a court pronounced against a party without hearing him, or GIVING HIM AN OPPORTUNITY TO BE HEARD is not a judicial determination of his rights."
Windsor v. *McVeigh,* 93 U. S. 274-277, 23 L. Ed. 914.

The Supreme Court of Michigan held:

"Every man is entitled to HIS DAY IN COURT BEFORE HIS RIGHTS CAN BE FINALLY DISPOSED OF, and even the legislature could not deprive him of the right."

Ehlers v. *Stoeckle*, 37 Mich. 261.

"Equity CANNOT TRY CASES PIECEMEAL."

Stephenson v. *Golden*, 279 Mich. 439, on Rehearing, 710, at 733.

"No such practice is known to the courts of this state. When defendants in a chancery suit have answered and in their answer have inserted the usual demurrer clause, and replications have been filed, the cause must go to a hearing upon THE ISSUES JOINED and a final decreed rendered. It is neither proper nor good practice to permit parties to then take advantage of a demurrer and bring the case into this court by PIECEMEAL. The result would be two trials, and possibly two appeals to this court to determine the issues, and great delay. We cannot sanction such a practice, even at the request of the parties litigant."

Gustin v. *Alpena Circuit Judge*, 285 Mich. 192.

(C) Petitioner Has Been Deprived of His Rights and Property Without Due Process of Law

By said summary judgment as rendered, Petitioner has been deprived of his valuable right to vindicate his professional reputation as a physician, surgeon and medical examiner in his community and to obtain redress and damages for said conspiracy and slander, in whatever amount of damages he may be able to prove to the satisfaction of the court and jury, not exceeding the sum of one million dollars, as set forth in his declaration.

This Court held that a right of action to recover damages for an injury is PROPERTY:

Angle v. *Chicago, St. P. M. & O. R. Co.*, 151 U. S. 1, 14 Sup. Ct. Rep. 240, 38 L. Ed. 55.

It has been held that "Due process of law" implies a conformity with natural and inherent principles of justice, and forbids the taking of one man's property or right of property for another's or the state's benefit without compensation, and requires that no one shall be condemned in person or property without opportunity to be heard:

Holden v. *Hardy,* 169 U. S. 366, 18 Sup. Ct. Rep. 383, 42 L. Ed. 780.

"Due process" means that there can be no proceeding against life, liberty or property which may result in the deprivation of either, without the observance of those general rules established in our system of jurisprudence for the security of private rights:

Turpin v. *Lemon,* 187 U. S. 51, 23 S. Ct. Rep. 20, 47 L. Ed. 70.

It is well established that a man's business, occupation, PROFESSION OR CALLING IS HIS PROPERTY AND IS PROTECTED AND GUARANTEED BY THE CONSTITUTION OF THE UNITED STATES:

Slaughter-House Cases, 16 Wall. 36, 21 L. Ed. 394.

It has been held that "due process of law" means a trial in which the rights of the party shall be decided by a tribunal appointed by law, which tribunal is to be governed by rules of law previously established:

Kilbourn v. *Thompson,* 103 U. S. 168, 26 L. Ed. 377.

It has been held that to subject the individual property of the citizens of a municipality, by a SUMMARY PROCEEDING IN EQUITY, to the payment of a judgment against the municipality because the remedy by mandamus has proved unavailing, would be a denial of due process of law:

Rees v. *Watertown,* 19 Wall. 107, 22 L. Ed. 72.

Due process of law signifies a right TO BE HEARD in one's defense:

Hovey v. *Elliott*, 167 U. S. 409, 17 Sup. Ct. Rep. 841, 42 L. Ed. 215.

This Court has held:

"Due process requires that there be opportunity to present EVERY AVAILABLE DEFENSE."

American Surety Co. v. *Baldwin*, Idaho, 53 Sup. Ct. 98, 287 U. S. 156, 77 L. Ed. 231, 86 A. L. R. 298.

This Court has also held:

"The term 'due process of law' when applied to judicial proceedings means a course of legal proceedings ACCORDING TO THOSE RULES AND PRINCIPLES WHICH HAVE BEEN ESTABLISHED BY OUR SYSTEM OF JURISPRUDENCE FOR THE PROTECTION AND ENFORCEMENT OF PRIVATE RIGHTS."

Pennoyer v. *Neff*, 95 U. S. 679, 24 L. Ed. 565.

(D) Petitioner Has Been Deprived of His Right to Equal Application and Protection of Law

By the summary judgment rendered by the Circuit Court for Wayne County and affirmed as a finality by the Michigan Supreme Court in favor of Respondent, Petitioner has been deprived of his right guaranteed by the U. S. Constitution to have equal application and protection of the law.

The Michigan Supreme Court held:

"'If persons under the same circumstances and conditions are treated differently, there is ARBITRARY DISCRIMINATION, AND NOT CLASSIFICATION'."

Davidow v. *Wadsworth Mfg. Co.*, 211 Mich. 90, at 97.

This Court has held:

"Since a law may be unconstitutional because of the manner in which it is being administered, a federal

question may be involved on an appeal, based not on a state law as written, but as administered."

Myles Salt Co. v. *Iberia, etc., Drainage District,* 239 U. S. 478.

In the case at bar, the Michigan Courts administered section 14260 of Michigan Compiled Laws of 1929 and section 7 of Michigan Court Rule 30 in such a way as to raise the federal question here presented to this Honorable Court.

A Federal Court has stated:

"By 'denial of equal protection of the laws' under the Federal Constitution, is meant to refuse to grant or to WITHHOLD EQUAL TREATMENT in conferring or securing rights or imposing or exacting performance of duties, intentionally to treat differently or TO DISCRIMINATE IN SO DOING (Syl. 7).

"The 'equal protection of the laws' provision of the Fourteenth Amendment extends to each department of the state government in the exercise of its special functions, and to those who represent the state as officers or agents" (Syl. 3).

Louisville & Nashville R. R. Co. v. *Bosworth,* 230 Fed. 191.

Section 14260 of Michigan Compiled Laws of 1929 applies ONLY TO MOTIONS FOR A SUMMARY JUDGMENT ON BEHALF OF A PLAINTIFF, HENCE IT AFFORDS NO PROPER FOUNDATION FOR RESPONDENT CORPORATION'S MOTION IN THE CASE AT BAR.

Section 7 of Michigan Court Rule 30, which Respondent relies upon to sustain its motion for a summary judgment provides that "BOTH PLAINTIFF AND DEFENDANT ARE TO HAVE AN EQUAL RIGHT TO A SUMMARY JUDGMENT, UPON PROPER PROOFS." Therefore, unless it can be fairly held that Petitioner HAS AN EQUAL RIGHT TO A SUMMARY JUDGMENT in the case at bar, the Federal Constitution has been violated in the particulars pointed out.

WHEREFORE your Petitioner prays that this Honorable Court may require the Michigan Supreme Court to certify to it for review and determination the said cause of Dr. Tom H. Robertson, M. D., as Plaintiff and Appellant, vs. New York Life Insurance Co., a New York State Corporation, as Defendant and Appellee, being calendar No. 42951 of the June Term, 1945, and that the said summary judgment against this Petitioner and in favor of said Respondent New York Life Insurance Company may be vacated, set aside and held for naught and said cause remanded for trial of the issues upon the merits as provided by law and said U. S. Constitution.

DR. TOM H. ROBERTSON, M. D.,
Petitioner Pro Se.